Supreme Court, U.S.
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No. 02 12 23 FEB 5 2003

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In the Supreme Court of the United States

VICTORIA COUNTY, TEXAS,
Petitioner,

v.

AUBARY DELANO PYLE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

1. Whether, as in lawsuits based on other types of discrimination, a claimant, in order to be entitled to damages, is required to point to a policymaker or policy of a public entity when bringing a lawsuit under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, et seq. and § 504 of the Rehabilitation Act of 1973, 24 U.S.C. § 794, et seq.

2. Whether the doctrine of *respondeat superior* applies to claims brought under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, et seq. and Section 504 of the Rehabilitation Act of 1973, 24 U.S.C. § 794, et seq.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Victoria County, Texas, a public entity and a county of the State of Texas, located in the Southern District of Texas. Victoria County, Texas was the Defendant in the District Court and the Appellant in the Fifth Circuit Court of Appeals.

Respondent

Respondent is Aubary Delano Pyle, an individual citizen of the United States, residing in the Southern District of Texas. Aubary Delano Pyle was the Plaintiff in the District Court and the Appellee in the Fifth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit opinion (Appendix B at 3a) is reported at 302 F.3d 567 (5th Cir. 2002). The November 7, 2002 Order of the Fifth Circuit (Appendix A at 1a) denying the Petition for Rehearing En Banc is not published. The July 25, 2000 Order of the District Court (Appendix D at 19a) entering final judgment in favor of Respondent is unreported.

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit was filed September 3, 2002. The Court of Appeals entered an order denying a timely petition for rehearing en banc on November 7, 2002 (Appendix A at 1a).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. 42 U.S.C. § 12112, *et seq.*, Title I of the Americans with Disabilities Act of 1990, prohibiting discrimination in employment.

B. 42 U.S.C. § 12132, *et seq.*, Title II of the Americans with Disabilities Act of 1990, prohibiting discrimination in public services.

C. 29 U.S.C. §794, *et seq.*, Section 504 of the Rehabilitation Act, prohibiting discrimination by entities provided with public funds.

STATEMENT OF THE CASE

This is an arrest and detention case in which Aubary Delano Pyle, a man with a hearing disability, claimed that Victoria County violated his rights under Title II of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983. On July 17, 1998, Pyle was involved in a car accident when he rear-ended another vehicle traveling on the shoulder of a U.S. highway in Victoria County, Texas. Two Victoria County Sheriff's Deputies arrived at the accident scene and, after an investigation, determined that there was probable cause to arrest Pyle on a charge of driving under the influence of drugs. Pyle was placed in jail on July 17, 1998 and he was released on July 19, 1998, after posting bond.

Subsequently, Pyle filed a lawsuit against Victoria County alleging violations of Title II of the ADA, 42 U.S.C. § 12132, et seq.; Section 504 of the RA, 29 U.S.C. § 794, et seq.; Chapter 121 of the Texas Human Resources Code ("THRC"); and 42 U.S.C. § 1983. During trial, after Pyle rested, Victoria County moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The district court granted its motion on the § 1983 claim for denial of medical attention and unauthorized medical testing, but denied the motion as to Pyle's ADA, RA and THRC claims. As to these claims, the district court ruled that a fact issue existed as to whether there was intentional discrimination or deliberate indifference in Victoria County's treatment of Pyle.

The trial court instructed the jury "In order for Victoria County's conduct to be intentional, the plaintiff must show that Victoria County ***policymakers*** were deliberately indifferent to the strong likelihood that their actions or inaction were violating the plaintiff's rights under the ADA." There were no instructions on vicarious liability (*respondeat superior*) whereby Victoria County acts through its agents and employees. Pyle made no objections to the court's instructions, nor did he request any additional instructions.

Despite hearing no evidence that a policy or policymaker was the moving force behind Pyle's damages, the jury found that (1) Pyle, by reason of his hearing disability, was excluded from participation in, or denied the benefits of, the services, programs, or activities of an entity, or otherwise subjected to discrimination by Victoria County; (2) Victoria County's conduct was intentional; and (3) Victoria County's exclusion, denial or discrimination proximately caused damages to Pyle. The jury awarded Pyle compensatory damages in the amount of Two Hundred Thirty Thousand Dollars ($230,000.00). The jury did not answer the questions pertaining to Plaintiff's state law THRC claims. The trial court entered judgment for $230,000 on July 25, 2000. Victoria County appealed the judgment to the Fifth Circuit Court of Appeals.

In its appeal to the Fifth Circuit, Victoria County principally argued that there was no evidence that Victoria County's conduct toward Pyle was intentional because there was no evidence that a policymaker for Victoria County acted with deliberate indifference to the strong likelihood that a violation of Pyle's protected rights would result from the implementation of a policy of Victoria County.

In its opinion denying Victoria County's appeal, the Fifth Circuit stated that the issue was one of first impression and that it had yet to speak on the question of whether a policy of discrimination must be identified to sustain a claim under the ADA or the RA. The Fifth Circuit held that as opposed to § 1983 jurisprudence, municipalities could be liable for damages under the doctrine of *respondeat superior* under the ADA or Rehabilitation Act and that proof of policymaker involvement or a policy of discrimination is unnecessary for ADA or Rehabilitation Act damage claims.[1] (App. B at 3a).

Victoria County timely filed a Petition for Rehearing En Banc, and on November 7, 2002 the Fifth Circuit entered its order denying the petition for rehearing. (App. A at 1a).

This appeal is based upon the proposition that the doctrine of *respondeat superior* is inapplicable in a Title II ADA case. Rather, the claimant must show policymaker involvement. In this case, there is no evidence of policymaker involvement.[2]

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[1] The Fifth Circuit's adoption of *respondeat superior* is in spite of the fact that (1) Pyle never pled *respondeat superior*, (2) the court never instructed the jury on *respondeat superior*, (3) Pyle never objected to the instructions given, and (4) *respondeat superior* was never briefed by either party in the appeal.

[2] In its opinion, the Fifth Circuit Court of Appeals devoted much of its time addressing Rule 50(b) of the Federal Rules of Civil Procedure and the fact that Victoria County did not comply with the Rule when it failed to renew its motion for directed verdict at the close of all evidence. The court ruled that such deviation from the Rule was not de minimis, and thus, it waived any challenge on appeal to the sufficiency of the evidence supporting the jury's verdict. (App. B at 10a). While Victoria County believes that the

REASONS FOR GRANTING THE PETITION

Since its enactment, the Americans with Disabilities Act of 1990 (ADA) has caused considerable uncertainty among both district and circuit courts as to the Act's application within both private and public settings. The issue giving rise to this appeal lies with disability claimants' required evidentiary showing against municipalities or counties and whether it is the same as that relating to claims based on other forms of discrimination, including race, color, sex, national origin, age and religion.

In this case, the Fifth Circuit Court of Appeals has decided that, as opposed to claimants who bring lawsuits against public entities pursuant to 42 U.S.C.§1983 alleging race, sex or age discrimination, a claimant bringing a lawsuit under Title II of the ADA may rely on the doctrine of *respondeat superior*. The Fifth Circuit Court of Appeals held that in order to be entitled to damages the claimant need not point to a policymaker or to a policy of the entity as must §1983 claimants. Such a ruling, in effect, causes a preference in favor of one class of individuals who claim discrimination based on disability. That is, with the Fifth Circuit's ruling, individuals claiming discrimination based on disability have the benefit of a lower threshold of proof than those individuals claiming discrimination based on other forms of

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court's ruling is harsh and excessively technical, it does not challenge the court's decision regarding Rule 50(b). Victoria County is instead asserting that the elements of proof in cases involving Title II of the ADA should be uniform across the circuits and they should include policymaker involvment, not *respondeat superior*. In this appeal, Victoria County asserts that the district court and jury heard *no* evidence of policymaker involvment, not just an insufficiency of evidence.

discrimination, including race, color, sex, national origin, age and religion.

I. The Decision of the Fifth Circuit Court of Appeals Conflicts With Decisions of Other Circuits.

As support for its holding, the Fifth Circuit cites the Fourth, Seventh, Ninth and Eleventh Circuits as all agreeing that when a claimant asserts a cause of action against a public entity, under either the ADA or the RA, the public entity is liable for the vicarious acts of any of its employees. The cases cited by the Fifth Circuit are: *Rosen v. Montgomery County Md.*, 121 F.3d 154, 157 (4th Cir. 1997); *Silk v. City of Chicago,* 194 F.3d 788, 806 (7th Cir. 1999); *Duvall v. County of Kitsap,* 260 F.3d 1124, 1141 (9th Cir. 2001); and *Mason vs. Stallings,* 82 F.3d 1007, 1009 (11th Cir. 1996). Assuming that these cases support the application of *respondeat superior* to claims brought under Title II of the ADA, they conflict with cases from the Second, Sixth, Eighth and Tenth Circuits wherein *respondeat superior* is not applied.

The Second Circuit Court's cases are *Bartlett v. New York State Bd. Of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998), *judgment vacated on other grounds and remanded*, 527 U.S. 1031 (1999) and *Freydel v. New York Hosp.*, 242 F.3d 365 (unpublished disposition), No. 00-7108, 2000 WL 1836755 (2nd Cir. Dec. 13, 2000). These cases stand for the proposition that in order for a municipality or county to be liable under Title II of the ADA, a claimant must have evidence of policy or policymaker involvement. Four district court cases in the second circuit also stand for the same proposition. *Constance v. Suny Health Ctr. at Syracuse*, 166 F.Supp.2d 663 (N.D.N.Y. 2001); *Butler v. South Glens Falls*

Cent. School Dist., 106 F.Supp.2d 414 (N.D.N.Y.2000); *Alvarez v. New York City Health & Hospitals Corp.*, 2002 WL 1585637 (S.D.N.Y. 2002); and *Bravin v. Mount Sinai Med. Ctr.*, 58 F.Supp.2d 269 (S.D.N.Y. 1999).

Likewise, the Tenth Circuit Court clearly believes in the necessity of the showing of a policymaker or policy for liability under Title II and §504. In *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147 (10th Cir. 1999) the court held that intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of §504 of the RA. Id. at 1153.

The Southern District of Ohio in the Sixth Circuit cites the above Second Circuit cases in support of its holding that a policy or policymaker must be identified in Title II claims. *Center v. City of West Carrollton*, 227 F. Supp.2d 863 (S.D. Ohio 2002); *Davis v. Flexman*, 109 F.Supp.2d 776 (S.D. Ohio 1999). The Northern District of Iowa in the Eighth Circuit also holds that a county is liable under Title II of the ADA and §504 of the RA only through its policies and practices. *Hahn ex rel. Barta v. Linn County Iowa*, 130 F.Supp.2d 1036, 1049 (N.D. Iowa 2001).

The Second and Tenth Circuit Courts and district courts in the Sixth and Eighth Circuits keep intact the framework that the Supreme Court established in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978)(Municipalities may not be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.). Now the Fifth Circuit has joined the several Circuits who have decided to deviate from this standard. There is no logical way to reconcile the split of authority on this important issue. Individuals subjected to

discrimination of all types are being subjected to different standards of proof depending on their domicile within the United States.

II. The Decision of the Fifth Circuit Court of Appeals is Incorrect

To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III). This case is *not* a case under Title I of the ADA. Pyle was not an employee of Victoria County, thus Title I –Employment- is unavailable and inapplicable to his claims against the County. To assert a claim against Victoria County, Pyle correctly uses Title II – Public Services- and §504 of the RA.

A. Title I and Title II have different standards of proof

The distinction between Title I and Title II is significant. By statute, the remedies for violations of Title II of the ADA and the RA are co-extensive with each other, 42 U.S.C. §12133; 29 U.S.C. §794a(a)(2), and are linked to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq*. These statutes require that ADA and RA remedies be construed the same as remedies under Title VI. *Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998). On the other hand, while Title VI is the basis for Title II of the ADA, Title I of the ADA incorporates the remedies of Title VII of the Civil Rights Act of 1964, not Title VI. *McCachren v. Blacklick Valley School Dist.*, 217 F.Supp.2d 594 (W.D. Pa. 2002).

The Supreme Court has held that vicarious liability and agency principles apply to Title VII. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 534 U.S. 742 (1998). In a recent Title VII case, the Supreme Court stated, "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer v. Holley*, 2000 WL 141310 (Jan. 22, 2003).

However, under Title VI, agency principles do not apply. *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274 (1998)(Traditional agency principles of *respondeat superior* do not apply to support liability for a school district.). *Gebser* was a case involving Title IX, and the Court held that Title IX was modeled after Title VI. *Id.*(citing *Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979)). Title IX is parallel to Title VI except that it prohibits sex discrimination, not race. In *Gebser*, the Court held that the Title VI intentional discrimination standard requires a showing of knowledge or direct policymaker involvement in the discrimination; *respondeat superior* does not apply. *Id.* at 277.

A number of lower courts have adopted the Title VI intentional discrimination standard, and require a showing of knowledge or direct involvement by public entities in the discrimination or failure of the school to take appropriate remedial action. *See Oona R. v. Santa Rosa City Schools*, 890 F.Supp. 1452 (N.D. Cal. 1995); *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560 (N.D. Cal 1993); *Howard v. Board of Educ.*, 876 F.Supp. 959 (N.D. Ill. 1995); *Letlow v. Evans*, 857 F.Supp. 676 (W.D. Mo. 1994); *Floyd v. Waiters*, 831 F.Supp. 867 (N.D. Ga. 1993); *R.L.R. v. Prague Pub. Sch. Dist. I-103*, 838 F.Supp. 1526 (W.D. Okla. 1993).

B. Fifth Circuit Court references Title I cases

In this case the Fifth Circuit Court of Appeals only references four cases as supporting its holding that vicarious liability applies in Title II lawsuits. Two of these cases are not, however, Title II cases, but rather they involve lawsuits brought by employees under Title I. *Silk v. City of Chicago,* 194 F.3d 788, 806 (7th Cir. 1999); *Mason vs. Stallings,* 82 F.3d 1007, 1009 (11th Cir. 1996). As outlined above, Title I and Title II are at different ends of the *respondeat superior* spectrum. It is illogical to rely upon Title I cases in determining the application of *respondeat superior* to a Title II case.

Consequently, the Fifth Circuit Court has only referenced two Title II cases in support of its holding, one from the Fourth Circuit and another from the Ninth. *Rosen v. Montgomery County Md.*, 121 F.3d 154, 157 (4th Cir. 1997); *Duvall v. County of Kitsap,* 260 F.3d 1124, 1141 (9th Cir. 2001). *Rosen*, however, only references three cases, two of which are employment cases brought under Title I. *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir. 1994); *EEOC v. AIC Sec. Investigations, LTD., 55 F.3d 1276, 1279 (7th Cir. 1995*). *Birbeck* involves the Age Discrimination in Employment Act and *EEOC* makes no mention of vicarious liability. The only Title II case cited in *Rosen* is *Bonner v. Lewis*, 857 F.2d 559, 566-67 (9th Cir. 1988)(vicarious liability applies to §504). Thus the Fourth Circuit, as well as the Fifth Circuit, relies on Ninth Circuit law on the issue.

The Ninth Circuit has issued two opinions that stand for the proposition that vicarious liability applies to Title II claims. *Duvall*, 260 F.3d at 1141; *Bonner*, 857 F.2d 566-67.

These two cases however conflict with the most recent Ninth Circuit case, *Sexton v. County of Santa Clara*, 7 Fed. Appx. 736, 2001 WL 357516 (9th Cir. April 9, 2001) (Not selected for publication in the Federal Reporter, NO. 99-17297).

In *Sexton*, the Ninth Circuit held that that a county was not liable under the ADA where the plaintiff identified no policy attributable to the county from which her injury flowed, and the plaintiff did not show that county personnel with whom she interacted was a county policymaker. *Id.* at 738. It is clear, therefore, that the Fifth Circuit's supporting authority is frail and insubstantial. The Fourth and Fifth Circuit Courts are both relying on two Ninth Circuit cases that the Ninth Circuit itself has seemingly placed in question.

III. The Question Presented is Important and the Decision of the Fifth Circuit Disparately Impacts Members of Protected Classes

In our society members of *all* protected classes should be afforded equal protection under the law thereby having unvarying remedies in enforcing their rights. *Certiorari* should be accepted in order to resolve the apparent split among the circuits with regard to the standard utilized in Title II cases as compared to that in other discrimination cases. If the split is left unsettled then disabled individuals who fall subject to discrimination will be held to varying standards depending on their circuit court's interpretation of Title II. Moreover, in those circuits that accept the *respondeat superior* theory in Title II and §504, members of protected classes will be held to variant standards of proof when bringing credible discrimination claims. That is, while Title II claimants may simply rely on vicarious liability in order to successfully recover damages, claimants subjected to other

forms of discrimination must proffer evidence of policy or policymaker involvement.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-41038

[Filed November 7, 2002]

AUBARY DELANO-PYLE, Plaintiff-Appellee,	)
v.	)
VICTORIA COUNTY, TEXAS; ET AL., Defendants,	)
VICTORIA COUNTY, TEXAS, Defendant-Appellant.	)

Appeals from the United States District Court
for the Southern District of Texas, Brownsville

JUDGES:
Before JONES, EMILIO M. GARZA, and STEWART, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-41038

[Filed September 3, 2002]

AUBARY DELANO-PYLE, Plaintiff-Appellee,	)
versus	)
VICTORIA COUNTY, TEXAS; ET AL., Defendants,	)
VICTORIA COUNTY, TEXAS, Defendant-Appellant.	)

Appeals from the United States District Court
for the Southern District of Texas
B-99-CV-171
Hilda G Tagle, US District Judge

JUDGES:
Before JONES, EMILIO M. GARZA, and STEWART, Circuit Judges.

OPINION

CARL E. STEWART, Circuit Judge:

Victoria County appeals the district court's denial of its motion for judgment as a matter of law on Aubary Delano-Pyle's ("Pyle") Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA") claims. For the reasons stated herein, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On July 17, 1998, Pyle, who is severely hearing-impaired, was involved in a car accident when he rear-ended another vehicle traveling on the shoulder of Highway 77 in Victoria County. Victoria County Deputies Anthony Daniel ("Daniel") and Dana Wager ("Wager") arrived at the scene of the accident in response to a report of an incoherent subject at the location. Shortly after the officers arrived, Pyle informed them of his hearing disability. While investigating the accident, Daniel searched Pyle's vehicle and discovered Hydrocodone and Darvocet.[1] Despite his knowledge of Pyle's disability, Daniel proceeded to administer three sobriety tests without asking Pyle which form of communication would be effective for him. Daniel testified that, prior to administering the tests, he turned on the video camera in his patrol car, which is standard procedure when an officer suspects that there may be a need for an arrest.

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[1] A physician prescribed Hydrocodone to Pyle for shoulder pain and the Darvocet was prescribed to his uncle Charles Pyle. There is no evidence that Pyle was under the influence of either of the medications at the time the accident took place.

First, Daniel administered what is known as the "walk and turn" test. This test requires the individual to take nine steps, heel-to-toe, along a straight designated line while counting the steps out loud and watching his feet. After taking nine steps, the subject must then turn around and return to the starting point in the same manner. Daniel demonstrated the test for Pyle, however, Daniel had his back turned to Pyle while giving instructions. Pyle performed the task as demonstrated, but because he did not understand the instructions as communicated, he took more than nine steps before turning around.

Second, Daniel administered a test called the "one-leg stand." This required Pyle to stand on one-leg and count to ten. The videotape revealed that Daniel demonstrated the task, but spoke very quickly when giving instructions. Again, Pyle was able to complete the task as demonstrated, however, he counted to fourteen, rather than ten. Lastly, Daniel conducted a finger-to-nose test. Daniel instructed Pyle to stand straight with his heels together, his arms at his sides, and his head tilted back. He further requested that Pyle touch the end of his nose with his index finger by bringing his arm and hand from his side directly to the end of his nose. In demonstrating this test, Daniel tilted his head back, extended his arms, and reached and touched his nose. With his head still tilted, Daniel requested that Pyle touch his nose six times. Pyle performed the task as demonstrated, however, due to his failure to understand Daniel's instructions, he touched his nose approximately twenty-five times. Daniel concluded that Pyle was unable to complete the tests as instructed, and

arrested him for driving while intoxicated.[2] Pyle asserts that he did not understand the directions given by the officer because he was unable to read his lips and, had he understood, he would have performed the tests as requested. Prior to arresting Pyle, Daniel read him his Miranda warnings. When Daniel asked Pyle if he understood his rights as communicated to him, Pyle did not respond. Daniel testified that he was not sure if Pyle understood either the verbal instructions given by Daniel during the administration of the sobriety tests or the Miranda warnings given at the scene.

At the police station, Daniel read Pyle his legal rights once again and wrote the Miranda warnings on a blackboard. With the knowledge that Pyle is hearing-impaired and may not have understood his verbal communications, Daniel, nonetheless, interrogated him without any accommodations to ensure that Pyle understood the circumstances of his arrest. After the interrogation, Daniel requested that Pyle consent to a blood test. Pyle maintains that Daniel asked him six times before he finally agreed. After passing the blood test, Pyle was released on July 19, 1998.

Subsequently, Pyle filed a lawsuit against Victoria County alleging violations of Title II of the ADA, 42 U.S.C. § 12132, et seq.; section 504 of the RA, 29 U.S.C. § 794, et seq.; chapter 121 of the Texas Human Resources Code ("THRC"); and 42 U.S.C. § 1983. During trial, after Pyle

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[2] Pyle asserts that he was also arrested for failure to produce proof of insurance. However, the police report does not evidence such an offense.

rested, Victoria County moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The district court granted its motion on the § 1983 claim for denial of medical attention and unauthorized medical testing, but denied the motion as to Pyle's ADA, RA, and THRC claims. As to these claims, the district court ruled that a fact issue existed as to whether there was intentional discrimination or deliberate indifference in Victoria County's treatment of Pyle.

Victoria County presented its case and the claims were submitted to the jury. Victoria County did not renew its motion for judgment as a matter of law. Specifically, the jury found that (1) Pyle, by reason of his hearing disability, was excluded from participation in, or denied the benefits of, the services, programs, or activities of a public entity, or otherwise subjected to discrimination by Victoria County; (2) Victoria County's conduct was intentional; and (3) Victoria County's exclusion, denial, or discrimination proximately caused damages to Pyle. The jury awarded Pyle compensatory damages in the amount of $ 230,000. Victoria County appeals the denial of judgment as a matter of law on the ADA and RA claims, but does not appeal the denial on the THRC claim.[3]

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[3] Pyle asserts that his THRC claim is an independent basis upon which to sustain the jury verdict absent an appeal by Victoria County. Victoria County correctly responds that the jury did not answer either of the interrogatories which related to the THRC claim, and Pyle failed to object to them not being answered. Thus, Pyle has waived this claim. *See Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197, 1203 (10th Cir. 1988) (holding that when a party is aware of the jury's failure to answer an interrogatory and does not object, nor request the district court to

STANDARD OF REVIEW

Victoria County appeals the district court's denial of its motion for judgment as a matter of law made at the close of Pyle's case-in-chief. Essentially, it argues that Pyle failed to present sufficient evidence establishing that (1) a policymaker for Victoria County acted with deliberate indifference to the strong likelihood that Pyle's rights under the ADA or the RA would be violated, or (2) its conduct was intentional.

We review a district court's ruling on a Rule 50(a) motion for judgment as a matter of law *de novo*. *Resolution Trust Corp. v. Cramer*, 6 F.3d 1102, 1109 (5th Cir. 1993). Under this standard, we view all of the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Id.* (citation omitted). A district court may not grant a Rule 50(a) motion "unless a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Fitzgerald v. Weasler Eng'g, Inc.*, 258 F.3d 326, 337 (5th Cir. 2001). This court reviews a jury's verdict for sufficiency of the evidence by determining whether

> reasonable and fair-minded [jurors] in the exercise of impartial judgment might reach different conclusions . . . . A mere scintilla is insufficient to present a question for the jury. . . . However, it is the function of the jury as

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resubmit the interrogatory to the jury, the party has waived his right to assert the issue on appeal).

> the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

MacArthur v. Univ. of Tex. Health Ctr. at Tyler, 45 F.3d 890, 896 (5th Cir. 1995) (citation omitted).

According to Rule 50(b) of the Federal Rules of Civil Procedure, it is well-settled that a motion for directed verdict or judgment as a matter of law made at the close of the plaintiff's case-in-chief must be renewed at the close of the all evidence in the case. *Id.* (citing *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 671(5th Cir. 1993)). Thus, prior to addressing Victoria County's insufficiency of the evidence claim, we must first determine whether it is procedurally barred from challenging the evidentiary support for the jury's verdict when Victory County failed to renew its motion at the close of all the evidence. As a general rule, a party that fails to renew his motion for judgment as a matter of law at the conclusion of all the evidence waives its right to challenge the sufficiency of the evidence on appeal. *United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 960 (5th Cir. 1998). However, we have excused technical noncompliance with Rule 50(b) in limited circumstances. [HN5] In cases where this court has departed from the strict requirements of Rule 50(b), the "deviation from the rule was 'de minimis,' and the purposes of the rule were deemed accomplished." *Polanco v. City of Austin, Tex.*, 78 F.3d 968, 974 (5th Cir. 1996).

We have determined that this rule serves two fundamental purposes: "to enable the trial court to re-examine

the sufficiency of the evidence as a matter of law if, after verdict, the court must address a motion for judgment as a matter of law, and to alert the opposing party to the insufficiency of his case before being submitted to the jury." *Id.* (citation omitted). Thus, we have allowed a party to raise a sufficiency of the evidence contention, although failing to comply with the requirements of Rule 50(b), "when the purposes of the rule have been satisfied because the court has had the opportunity to reconsider sufficiency as a matter of law and because the nonmovant has had the opportunity to cure any insufficiencies." *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 956 (5th Cir. 1993) (citation omitted). Generally, however, we have only excused departures from Rule 50(b) where the trial court had taken under advisement an earlier motion for directed verdict, which was made after the plaintiff rested; the defendant presented no more than two witnesses prior to closing; only a few minutes elapsed from the time the motion for directed verdict was made and the conclusion of all the evidence; and no rebuttal evidence was introduced by the plaintiff. E.g., *Giles v. General Elec. Co.*, 245 F.3d 474, 483 (5th Cir. 2001) (citation omitted). In the absence of the circumstances stated above, we have found that the purposes of the rule have not been satisfied, and therefore, the complaining party has waived its right to contest the jury's verdict on sufficiency of the evidence grounds. *See Purcell*, 999 F.2d at 956.

Considering the facts before us, we conclude that Victoria County's departure from Rule 50(b) is not de minimis, and thus, it has waived any challenge on appeal to the sufficiency of the evidence supporting the jury's verdict. This case presents a factual pattern very similar to that addressed by this court in McCann. In McCann, the plaintiff

filed suit against Hill Petroleum, Inc. ("Hill") asserting Age Discrimination in Employment Act violations. At the conclusion of the plaintiff's case-in-chief, Hill moved for directed verdict asserting that the plaintiff failed to establish intentional discrimination by Hill. The motion was flatly rejected by the district court. As in this case, Hill neglected to inform this court, either in briefs or at oral argument, that it had not moved for judgment as a matter of law at the close of all of the evidence. We held that Hill's failure to renew its motion had the consequence of precluding this court's review of Hill's sufficiency of the evidence claim. *Id.*, 984 F.2d at 671. In determining that Hill's noncompliance with Rule 50 was not de minimis, we noted that (1) Hill's motion for directed verdict was flatly rejected, instead of being taken under advisement; and (2) Hill presented numerous witnesses after the close of the plaintiff's case. We concluded that "neither the district court nor the plaintiff[] could have been aware that Hill continued to challenge the sufficiency of the plaintiff [sic] *prime facie* case." *Id.*, 984 F.2d at 672. This court further noted that in Hill "[it] [was] not faced with a "de minimis" departure but rather a complete failure to follow the requirements of Rule 50(b)." *Id.* We acknowledged that this circuit "approaches such questions of technical compliance with 'liberal spirit,'" however, we declined to judicially rewrite the Federal Rules of Civil Procedure. *Id.*

Here, the district court ruled on Victoria County's motion for directed verdict immediately after it was made. Further, although Victoria County only presented two witnesses, an entire day, rather than a few minutes, elapsed from the time the motion was made and the close of all the evidence. In addition, Pyle submitted rebuttal evidence. Because we find Giles and McCann to be controlling

precedent, we conclude that Victoria County's noncompliance with Rule 50(b) cannot be regarded as de minimis.

Where a party fails to timely move for judgment as a matter of law, and such failure does not constitute a de minimis departure, "we will consider the issue as waived by the defendant and will treat the issue as being raised for the first time on appeal." *Polanco v. City of Austin, Tex.*, 78 F.3d 968, 974 (5th Cir. 1996). Accordingly, we review any challenge to the sufficiency of the evidence only for plain error. *Id.* Under the plain error standard, we will only reverse the jury's verdict "if the judgment works a manifest miscarriage of justice." *Giles*, 245 F.3d at 482 (citation omitted). Such review requires this court to merely ascertain if the plaintiff has submitted "*any* evidence in support of his claim." *Id.* If it is determined that no evidence supports the jury's verdict, "we will not simply enter judgment for the defendant; instead, we must order a new trial." *Id.* (citation omitted).

DISCUSSION

The ADA is a federal anti-discrimination statute designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[4] *Rizzo v. Children's World*

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[4] The ADA states in relevant part:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity,

Learning Ctr., Inc., 173 F.3d 254, 261 (5th Cir. 1999). The RA was enacted "to ensure that handicapped individuals are not denied jobs or other benefits because of prejudiced attitudes or ignorance of others."[5] *Brennan v. Stewart*, 834 F.2d 1248, 1259 (5th Cir. 1988). The language in the ADA generally tracks the language set forth in the RA. In fact, the ADA expressly provides that "the remedies, procedures and rights" available under the RA are also accessible under the ADA. 42 U.S.C. § 12133 (1995). Thus, "jurisprudence interpreting either section is applicable to both." *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000). A plaintiff asserting a private cause of action for violations of the ADA

> or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1995). A "public entity" is broadly defined under the statute as "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* §12131(1).

[5] The RA provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.

29 U.S.C. § 794 (1995).

or the RA may only recover compensatory damages upon a showing of intentional discrimination. *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 264 (5th Cir. 1984).

In the instant case, the jury instructions provided that, in order for Pyle to sustain a claim under the ADA or the RA, he must prove the following facts by a preponderance of the evidence: "First: That [he] was either 1) excluded from participation in or denied the benefits of services, programs, or activities of [Victoria County], or 2) was subjected to discrimination by Victoria County. Second: That Victoria County's conduct was intentional."

In addressing this issue, Victoria County argues that we should apply analogous case law involving § 1983 suits against municipalities. In Piotrowski v. City of Houston, we held that "municipal liability under § 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." 237 F.3d 567, 578 (5th Cir. 2001).

Victoria County argues that Pyle has failed to produce any evidence of policies, customs, or practices implemented by the Sheriff, which violated Pyle's rights under the ADA or the RA. The ADA and RA impose liability upon certain employers for disability discrimination. The definition of "employer" under the ADA specifically encompasses any agent of an employer covered by the statute. 42 U.S.C. §12111 (1995). In this case, Victoria County does not dispute that it is covered under the ADA. The Fourth, Seventh, Ninth, and Eleventh circuits have all agreed that when a plaintiff asserts a cause of action against an employer-municipality, under either the ADA or the RA, the public

entity is liable for the vicarious acts of *any* of its employees as specifically provided by the ADA. *Rosen v. Montgomery County Md.*, 121 F.3d 154, 157 (4th Cir. 1997); *Silk v. City of Chicago*, 194 F.3d 788, 806 (7th Cir. 1999); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001) (holding that the doctrine of respondeat superior applies to claims asserted directly under the ADA and the RA "in part because the historical justification for exempting municipalities from respondeat superior liability does not apply to [these statutes], and in part because the doctrine "would be entirely consistent with the policy of that statute, which is to eliminate discrimination against the handicapped"); *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996). Thus, the first element of a § 1983 claim -- i.e., a policymaker -- is not required under either the ADA or the RA.

Furthermore, while we have not yet spoken on the question of whether a policy of discrimination must be identified to sustain a claim under the ADA or the RA, the Fourth Circuit has considered the issue and has concluded that a policy is not required. *See Rosen*, 121 F.3d at 157 n.3 (finding that a county could be held liable under the ADA even in the absence of a *policy* of discrimination). We agree with our sister circuit on this point. The ADA expressly provides that a disabled person is discriminated against when an entity fails to "*take such steps as may be necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." *Id.* at § 12182(b)(2)(A)(iii) (emphasis added). A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies

or procedures to prevent discrimination based on disability. *Id.* § 12182(b)(2)(A)(ii)-(iii) (1985). Thus, although it is true that for claims asserted under § 1983, an official policy must be identified, the same rule cannot be reconciled with Congress's legislative objectives in enacting the ADA and the RA, and Victoria County has not cited any authority supporting this position.

Having concluded that neither a policymaker, nor an official policy must be identified for claims asserted under the ADA or the RA, we now turn our attention to Victoria County's assertion that Pyle failed to establish deliberate indifference. There is no "deliberate indifference" standard applicable to public entities for purposes of the ADA or the RA. However, in order to receive compensatory damages for violations of the Acts, a plaintiff must show intentional discrimination. *Carter*, 725 F.2d at 264. The facts addressed at trial support the jury's finding of intentional discrimination.

It is clear from the videotape of the accident that no matter how many times Daniel repeated himself and no matter how loudly he spoke, Pyle could not understand most of what he was saying. For example, while Daniel was demonstrating the sobriety tests, he told Pyle several times not to start the test until after he was finished demonstrating. Nonetheless, each time, Pyle started to perform the task while observing Daniel. Instead of viewing these actions as an indication that Pyle was not understanding his verbal commands and trying a more effective form of communication, Daniel only became annoyed and continued to further instruct Pyle through verbal communication. When asked whether his communications with Pyle were effective in that Pyle understood him, Daniel

answered "well, I don't know his state of mind. I knew he had a hearing problem."

In addition, during trial, Pyle's counsel asked Daniel if he was speaking quickly when informing Pyle of his legal rights. Daniel responded "yes, probably so, yes." Pyle's counsel proceeded to inquire as to whether Daniel believed this form of communication was effective. Daniel answered "somewhat, but no." Further, Daniel acknowledged that an officer must continue to provide Miranda warnings or whatever warnings required to be given an arrestee until the officer has a genuine belief that the arrestee actually understood him. However, Daniel admitted that he did not know whether Pyle understood his rights as verbally communicated.

After conducting a thorough review of the record, we cannot conclude that there was no evidence produced to support the verdict. Therefore, the jury was not plainly erroneous in finding that Pyle sustained a claim under the ADA and the RA against Victoria County.

CONCLUSION

Having concluded that Victoria County waived its sufficiency of the evidence claim and finding no plain error, we AFFIRM the district court's judgment.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CIVIL ACTION NO. B-98-171

[Filed September 21, 2000]

AUBARY DELANO PYLE
Plaintiff,

v.

VICTORIA COUNTY, TEXAS, ET AL.,
Defendants.

ORDER

BE IT REMEMBERED that on September 21, 2000, the Court reviewed Defendants' Motion to Alter or Amend the Judgment Pursuant to FRAP 59(e) [Dkt. No. 94]. The motion is hereby DENIED with leave to resubmit upon remand from the Fifth Circuit.

DONE at Brownsville, Texas, this 21st day of September 2000.

/s/
Hilda G. Tagle
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CIVIL ACTION NO. B-98-171

[Filed July 25, 2000]

AUBARY DELANO PYLE)
Plaintiff,)
)
v.)
)
VICTORIA COUNTY, TEXAS, ET AL.,)
Defendants.)

FINAL JUDGMENT

This case was tried before the Court and a jury. The issues having been tried and the jury having rendered a verdict for Plaintiff, it is ORDERED that Plaintiff recover from Defendant the sum of $230,000, with interest thereon at the rate of 6.375 percent as provided by law, and Plaintiff's costs of action.

DONE at Brownsville, Texas, this 25 day of July 2000.

/s/
Hilda G. Tagle
United States District Judge